

***United States Court of Appeals
for the Second Circuit***



**APPELLEE'S BRIEF
AND
APPENDIX**

7-2091

To be argued by
MARK C. RUTZICK

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

WIDELTO LEYVA,

Petitioner-Appellant,

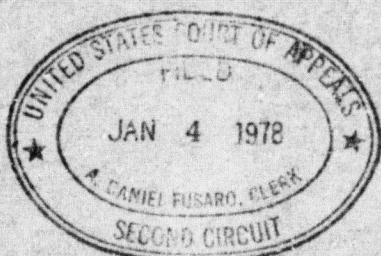
-against-

SUPERINTENDENT, GREEN HAVEN CORRECTIONAL
FACILITY,

Respondent-Appellee.

ON APPEAL FROM AN ORDER OF THE UNITED
STATES DISTRICT COURT FOR THE EASTERN
DISTRICT OF NEW YORK

BRIEF FOR RESPONDENT-APPELLEE
AND SUPPLEMENTAL APPENDIX



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BRIEF FOR RESPONDENT-APPELLEE
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Preliminary Statement

This is an appeal from an order of the United States District Court for the Eastern District of New York (Hon. Edward R. Neaher, U.S.D.J.) dated March 7, 1977 denying the petition for a writ of habeas corpus. Judge Neaher's decision denying the petition is reported at 428 F. Supp. 1.

Questions Presented

1. Does the evidentiary presumption set forth in New York Penal Law § 220.25(1), providing that with certain exceptions presence in an automobile containing a controlled

substance is presumptive evidence of knowing possession of the controlled substance by every occupant in the automobile, violate due process in a case where a package containing over two pounds of cocaine was found under an automobile seat directly next to the foot of the petitioner?

2. Was the use of the presumption in this case harmless error where the jury found not only possession but also intent to sell and the element of intent could only be inferred from the facts of the case without the use of any statutory presumption?

Statement of the Case

The jury in this case heard the following facts: On September 22, 1971 three New York City narcotics detectives, a police sergeant and an Assistant Kings County District Attorney left the District Attorney's office around 3:15 p.m. and traveled in two automobiles to the Brooklyn side of the Williamsburgh Bridge. (T699-702)* At 3:55 p.m. they

* In fact, the police were responding to a telephone tip received earlier that day from a confidential informant that a gold-colored 1969 Chevrolet bearing Florida license plates and containing a kilo of cocaine would be at the Brooklyn side of the Williamsburgh Bridge at 4:00 p.m. that day. (T 4-5). The jury was never informed of the informant's existence, and the informant did not testify at trial. References to "T - " are to the transcript of the State court suppression hearing and trial. Excerpts from the transcript of the State court trial are annexed to this Brief as a Supplemental Appendix, and the excerpted pages retain their original pagination for uniformity of citation.

intercepted and stopped a 1969 gold-colored Chevrolet bearing Florida license plates, with three passengers T702-705, 811-812. The driver of the car was Jose Low, in the middle of the front seat was Carmen Garcia, and to the right of Ms. Garcia in the passenger seat was the petitioner-appellant ("petitioner") Widelto Leyva. (T811-812, 892).

Detective Raymond Viera approached the car, opened the door on the passenger's side, and pulled the petitioner from the car. (T704). As he opened the car door he spotted a manila envelope on the floor of the car between Garcia and Leyva, protruding three to four inches from under the front seat. (T704, 715). Detective John McClean, who approached the driver's side of the car, spotted the envelope in the same location. (T813).

Detective Viera opened the sealed manila envelope and found two plastic packets filled with white powder. (T705). Upon subsequent chemical analysis each plastic packet proved to contain sixteen and one half ounces of a powder containing cocaine. T757-763.

The only defendant to testify was Jose Low. He described himself as a family man with no previous criminal record and an employment background in factories and restaurants. (T922-930). He testified that he had arrived in New York from Florida only the night before his arrest. (T933-934). He said that on September 22 he had been on his way to the bus terminal in Manhattan to travel to New Jersey when a friend offered him a ride and drove to a hotel somewhere in the "20's" in Manhattan. (T937). There the friend left and returned with Garcia and Leyva, whom Low had never met, and they asked him to drive them to Brooklyn. (T939). He agreed, and following directions from Garcia, drove to the location where the arrests occurred. (T939, 971-972).

Low presented no other evidence and neither Garcia nor Leyva presented any evidence.

At the close of the case the judge charged the jury that: the statutory presumption was rebuttable, by cross-

examination of the prosecution witnesses, by other defense witnesses or by the testimony of the defendants (T1181-1182); if rebutted, it no longer operates (T1178); the presumption merely permitted the jury to find knowing possession from presence in the automobile, but did not require it (T1178, 1182); at all times the burden of proof remained on the prosecution (T1170-1176, 1179, 1180, 1187); on the count involving intent to sell the jury must determine if it can infer intent from the facts of the case in evidence without the use of any statutory presumption (T1183-1186).

All the defendants were charged with Criminal Possession of a Dangerous Drug in the First Degree, or simple possession (then Penal Law § 220.23, repealed in 1973, L. 1973, c.276, § 18), and Criminal Possession of a Dangerous Drug in the Fourth Degree, the latter crime being possession with intent to sell (then Penal Law § 220.15, repealed in 1973, L. 1973, c. 276, § 18). The jury convicted all the defendants on the First Degree charge for possession, and convicted Garcia and Leyva but acquitted Low on the Fourth Degree charge involving intent to sell. (T 1258-1259).

The Appellate Division of the New York Supreme Court affirmed Leyva's conviction without opinion, People v. Leyva, 46 A D 2d 740 (Second Dept. 1974), as well as those of the others, see People v. Garcia, 46 A D 2d 846 (Second Dept. 1974); People v. Low, 44 A D 2d 910 (Second Dept. 1974).

In a careful and thorough opinion, the New York Court of Appeals examined the presumption at issue here and unanimously upheld it against the same due process challenge raised here. People v. Leyva, 38 N Y 2d 160 (1975).

Petitioner then filed his petition for a writ of habeas corpus in the District Court, challenging the statutory presumption of § 220.25(1) and raising various other points not pursued on this appeal. Judge Neaher phrased the issue as follows:

"The constitutional test, as applied to the facts of this case, is whether presence of a large quantity of cocaine --over a pound -- in an automobile was sufficient for a rational juror to find knowing possession of the drug by petitioner, as one of three occupants of the automobile, beyond a reasonable doubt." A. 55.*

* References to "A.-" are to the Appendix filed in this Court.

Applying that test, Judge Neaher denied the writ, holding that "the presumption of New York Penal Law § 220.25 passes constitutional muster in that a jury could find beyond a reasonable doubt that petitioner knowingly possessed cocaine." A. 55-56. On July 28, 1977 Judge Neaher granted a certificate of probable cause to appeal.

Challenged Statute

New York Penal Law § 220.25(1) provides:

§ 220.25 Criminal possession of a controlled substance; presumption

1. The presence of a controlled substance in an automobile, other than a public omnibus, is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such controlled substance was found; except that such presumption does not apply (a) to a duly licensed operator of an automobile who is at the time operating it for hire in the lawful and proper pursuit of his trade, or (b) to any person in the automobile if one of them, having obtained the controlled substance and not being under duress, is authorized to possess it and such controlled substance is in the same container as when received

possession thereof, or (c) when the controlled substance is concealed upon the person of one of the occupants.

POINT I

THE PRESUMPTION IN §220.25(1) SHOULD BE ADJUDGED BY THE "MORE-LIKELY-THAN-NOT" STANDARD OF CONSTITUTIONALITY RATHER THAN THE "REASONABLE DOUBT" STANDARD.

The proper test for the constitutionality of a presumption has been most definitively set forth by the Supreme Court in Leary v. United States, 395 U.S. 6 (1969). There, after reviewing its previous decisions as to the constitutionality of presumptions, the Court concluded:

"[A] criminal statutory presumption must be regarded as "irrational" or "arbitrary", and hence unconstitutional unless it can at least be said with substantial assurance that the presumed fact is more likely than not to flow from the proved fact on which it is made to depend. And in the judicial assessment the congressional determination favoring the particular presumption, must, of course, weigh heavily." Id. at 36 (emphasis supplied, footnote omitted).

Using that standard the Court invalidated the presumption set forth in 21 U.S.C. § 176a that possession of marijuana "shall be deemed sufficient evidence" that the marijuana was illegally imported and that the defendant had knowledge of the fact of illegal importation. The Court relied upon a wide range of factual and statistical information in support of its conclusion, and felt this information did not support the necessary determination that "at least a majority of marijuana possessors have learned of the foreign origin of their marijuana". Id. at 52.

In applying the "more likely than not" standard noted above, the Leary Court observed that it "did not reach the question whether a criminal presumption...must also satisfy the criminal 'reasonable doubt' standard if proof of the crime charged or an essential element thereof depends upon its use." Id. at 36 n. 64. In Turner v. United States, 396 U.S. 398 (1970) the Court again noted the question, Id. at 416, but did not decide it because the statutes in question relating to heroin and cocaine possession

would either meet both tests and thus survive, Ibid., or meet neither test and thus fail in any event, Id. at 422-24.

In Barnes v. United States, 412 U.S. 837 (1973) the Court once again noted the unanswered question of the applicability of the "reasonable doubt" standard, Id. at 842-43, but held that the common law presumption there at issue, that of "guilty knowledge ... from the fact of unexplained possession of stolen goods," Id. at 843, would meet the stricter test as well as the applicable "more-likely-than-not" test. Id. at 846. Significantly, however, the Court explained what the "reasonable doubt" standard would be if applicable. It applied the "rational connection" test of Tot v. United States, 319 U.S. 463 (1943) to the question of the presumption and would seem to permit the jury to convict if the jury found beyond a reasonable doubt, based upon "common sense and experience", Barnes, supra at 845, that a rational connection existed between the proven fact and the presumed fact. Viewed in this light, at least one commentator has concluded that the Barnes "reasonable-doubt"

test is less stringent than the Leary "more-likely-than-not" standard. See Rose, the Automobile Presumption In the New York Narcotics Law, 42 Ford. L. Rev. 761, 766-67 (1973-74).

Whatever the form of the "reasonable doubt" test, it is clear that the Supreme Court has never applied it as the proper test for any presumption. Nor has this Court. See United States v. Tavoularis, 515 F. 2d 1070, 1075 n. 11 (2d Cir. 1975). On the other hand, in United States v. Gainey, 380 U.S. 63 (1965), the Court upheld a presumption which permitted the jury to infer guilt of the crime of carrying on a distilling business from presence at an illegal still, using only the "rational connection" test of Tot v. United States, supra Gainey, supra at 66. Thus, Gainey did not present the "both or neither" situation which permitted the Court to avoid choosing a single test in Leary, Turner and Barnes, and in Gainey the Court did choose a single test -- the "more-likely-than-not" standard as set forth above in Leary v. United States.

Thus in determining the constitutionality of § 220.25(1) this Court should apply only the "more-likely-than-not" standard. Since the Supreme Court has never applied the "reasonable doubt" standard to federal law presumptions (all the above-cited cases involved federal laws), it would be unfair and prejudicial to apply an arguably stricter standard to a State law presumption.

Indeed, State law presumptions are entitled to a more lenient standard of review from the federal courts than federal law presumptions, and this Court should accord more deference to a State presumption than it might to a federal enactment. Only recently, in Patterson v. New York, - U.S. -, 45 U.S.L.W. 4708 (U.S. June 17, 1977) the Supreme Court stressed the primacy of the States in the administration of criminal justice, and the respect to be accorded State criminal laws:

"It goes without saying that preventing and dealing with crime is much more the business of the States than it is of the Federal Government, [citation omitted], and that we should not lightly construe the Constitution so as to intrude upon the administration of justice by the individual States. Among other things,

it is 'normally within the power of the state to regulate procedures under which its laws are carried out, including the burden of producing evidence and the burden of persuasion.'" Ibid, 45 U.S.L.W. at 4709 (citations omitted).

For this reason this Court should be most reluctant to strike down a state evidentiary presumption relating to the "burden of producing evidence." It should not strain to apply a strict test of constitutionality which would unduly impair the State's freedom to structure its criminal justice system to meet the demands upon it, but if anything should strain to uphold an important state evidentiary presumption such as the one in issue here. The "more-likely-than-not" test enunciated in Leary v. United States, supra, is the proper test of constitutionality in this case.

POINT II

EVEN APPLYING THE "REASONABLE DOUBT" STANDARD, THE DISTRICT COURT'S DECISION FINDING THAT § 220.25(1) SATISFIED THAT STANDARD SHOULD BE AFFIRMED.

A. History of § 220.25(1)

The presumption contained in § 220.25(1) was first

enacted into New York Law in 1952 as an amendment to § 1751 of the then-current Penal Law. See L. 1952, c. 414. It was adopted by the Legislature as part of a "legislative program recommended by the Attorney General after a year of intensive study of the narcotics problem." See 1952 Messages of the Governor, Legislative Memoranda, Narcotics, McKinney's 1952 Session Laws of New York at 1383; Attorney General's Report, Narcotics, A Growing Problem, A Public Challenge, A Plan for Action, N.Y. Legislative Documents, 1952, No. 27 (hereinafter "Report") at 77-88. Also included in the program was authorization for the first hospital in the country with a "non-criminal compulsory treatment program for young [narcotics] addicts." Ibid; Report at 89-108.*

The automobile presumption enacted in 1952 was clearly a response to two significant developments in New York in the years after World War II -- the enormous increase in illegal drug distribution which has made New York the drug

* That year Governor Dewey vetoed a bill which would have increased the crime of marijuana possession to a felony, on the ground that it conflicted with the terms of the Attorney General's narcotics legislative program. See 1952 Messages of the Governor, Veto Messages, Narcotics Growing, McKinney's 1952 Session Laws of New York at 1371.

capital of the nation and perhaps the world (Report at 13-46) and the equally rapid growth in automobile ownership and use in the period of the great post-war economic boom. See, e.g., R. Caro, The Power Broker 911-14 (1974). As these two phenomena grew they intersected to create a new and difficult problem of proof for law enforcement agencies, since the automobile provided an enclosed space convenient for the transport of drugs other than on the trafficker's person. See Comment, Possession of Dangerous Drugs In A Car - New York's Criminal Presumption Statute, 21 Buff. L. Rev. 188, 188-89 (1971) (hereafter "Comment, Possession"); Interim Report of the Temporary State Commission to Evaluate the Drug Laws, N.Y. Legislative Document, 1972, No. 10 (hereafter "Commission Report") at 69; also see People v. Lemmons, 40 N Y 2d 505, 511 (1976).

The response to this developing problem was the presumption of possession by all occupants of the automobile. Though rather dissimilar in substance and circumstance, the presumption was phrased in the form of the presumption in New York law that the presence of a weapon in an automobile constitutes presumptive evidence of illegal possession by

every occupant of the vehicle. See Penal Law 1909 § 1898-a (McKinney 1944), later § 1899(3) (McKinney 1966 Cumulative Annual Pocket Part) now enacted as Penal Law § 265.15(3) (McKinney 1967, 1976-77 Cumulative Annual Pocket Part); Report at 82-83.*

The new narcotics presumption was limited to quantities of drugs sufficient to trigger the then-statutory presumption of possession with intent to sell, see Penal Law 1909 § 1751(2), (4) (McKinney's 1944, 1966 Cumulative Annual Pocket Part) (now repealed); those quantities had been set at the amounts recommended in 1950 by New York County District Attorney Frank Hogan as double the amount which experts regarded as "practically conclusive" of intent to sell. Report at 78-79.

In 1961 the Legislature created a commission to develop a comprehensive revision to the Penal Law. L. 1961, c. 346. After thorough and exhaustive consideration, the Commission's efforts resulted in enactment of the landmark New York Penal Law which became effective September 1, 1967. L. 1965, c. 1030. The new Penal Law carried forward the presumption in § 1751 into a new § 220.25, see Gilbert Criminal

* Although the gun presumption statute has been recently overturned by a panel of this Court in Allen v. County Court, No. 77-2059 (November 29, 1977), that decision, as will be shown below, does not raise any new question as to § 220.25(1). A petition for en banc rehearing will be filed in that case shortly. Another gun statute, that presuming unlawful possession of a machine gun by all occupants of the room in which it is found, Penal Law 1909 § 1899 (1) (McKinney 1966 Cumulative Annual Pocket Part), now § 265.15(1), has been upheld. People v. Terra, 303 N Y 332 (1951), appeal dismissed for want of a substantial federal question, 342 U.S. 938 (1952). The dismissal of the appeal by the Supreme Court constitutes a statement on the merits of precedential value. Connor v. Hutto, 516 F. 2d 853 (8th Cir.), cert den. 423 U.S. 929 (1975); Ahern v. Murphy, 457 F. 2d 363 (7th Cir. 1972).

Code and Penal Law, 1969, Commission Staff Notes on the Proposed New York Penal Law at 1C-92, but with two significant modifications. First the new law eliminated the threshold "intent-to-sell" quantity requirement for the operation of the presumption, see Commission Report at 69, and second, the new law added an exception to its operation, not theretofore available, in the case where the drug is "concealed upon the person of one of the occupants" of the automobile. See Comment, Possession at 192-93. Together these two modifications worked a careful, reasoned extension of the original presumption, prohibiting its operation where the presumption is least likely to be rationally justified.

In 1970 the Legislative created a Temporary State Commission to Evaluate the Drug Laws, with authority to "make a comprehensive study of present state laws dealing with the use, possession and sale of narcotics" L. 1970, c. 474 § 2. The nine member Commission, consisting of four State Senators, three Assemblymen, a Judge and a medical doctor, conducted seven days of public hearings throughout the State, three major conferences and six plenary meetings, and its Subcommittee on Narcotic Drugs conducted an additional six days of public hearings. Commission Report at 3, 9. Altogether at least

114 witnesses appeared before the Commission. Commission Report at 96-100.

Following this far-reaching exploration of available information and public views, the Commission recommended retention of a modified version of the presumption in § 220.25(1).^{*} It concluded:

"We believe, and find, that it is rational and logical to presume that all occupants of a vehicle are aware of, and culpably involved in, possession of dangerous drugs found abandoned or secreted in a vehicle when the quantity of the drug is such that it would be extremely unlikely for an occupant to be unaware of its presence. We further find that the quantity of drug which reasonably indicates culpable involvement is the quantity of drug which would clearly set apart the distributor from the possessor for personal use.

We do not believe that persons transporting dealership quantities of contraband are likely to go driving about with innocent friends or that they are likely to pick up strangers. We do not doubt that this can and does in fact occasionally happen, but because we find it more reasonable to believe that the bare presence in the vehicle is culpable, we think it reasonable to presume culpability in the direction which the proven facts already point. Since the pre-

^{*} Although the Commission recommended, with some internal disagreement, elimination of the presumption for less-than-dealership quantities of drugs, that recommendation was not adopted by the Legislature. Commission Report at 69-70, 71.

sumption is an evidentiary one, it may be offset by any evidence, including the testimony of the defendant, which would negate the defendant's culpable involvement." Commission Report at 69.

The presumption in § 220.25(1) was retained in the New Article 220 which became effective September 1, 1973.* Another presumption, enacted in 1971, which related presence of certain narcotic drugs in open view in a room to knowing possession thereof by persons "in close proximity" in the room, was also retained. Penal Law § 220.25(2); see L. 1971 c. 1044.

This history in sum shows that the presumption in § 220.25(1) was first enacted following a careful year-long study by the Attorney General, was studied again only a decade later and was modified and retained in the 1967 Penal Law, and was studied yet again less than a decade after that and was again retained in the new Article 220 effective in 1973. Each of these studies brought to bear the knowledge and experience of law enforcement officials from around the State in dealing with the ever increasing narcotics problem. None of

* It was slightly amended to substitute the phrase "controlled substance" for the previous phrase "dangerous drug". L. 1973, c. 276 §§ 9, 20.

those officials, whose commitment to protect the innocent as well as to punish the guilty is unchallengeable, ever raised any concern that innocent persons would be wrongly convicted of crimes through the use of this presumption. These three careful studies in less than thirty years are irrefutable proof that this presumption, far from being either irrational or arbitrary, has an absolutely sound basis in both "common sense and experience", Barnes v. United States, supra, at 845, and satisfies whatever test of constitutionality may be appropriate.

B. Section 220.25(1) is constitutional

The proper inquiry in this case is, as Judge Neaher noted (A. 58), whether the § 220.25(1) presumption is constitutional as applied to the particular facts of this case, including the amount of narcotics involved. The Supreme Court has specifically indicated that the facts of a particular case, including the amount of narcotics involved, can be determinative as to the constitutionality of a presumption tied to the narcotics. Turner v. United States, supra, 396 U.S. at 419 n. 39.

This Court, too, has accepted this view and has upheld a presumption as to a large quantity of narcotics (one kilo, coincidentally the amount involved here) even after the Supreme Court had invalidated the very same presumption as applied to a much smaller quantity of the narcotic. United States v. Gonzales, 442 F. 2d 698 (2d Cir.) (en banc), cert. den. sub nom. Ovalle v. United States, 404 U.S. 845 (1971). Allen v. County Court, No. 77-2059 (decided November 29, 1977) (2d. Cir.) is in accord with this analysis and specifically notes the propriety of its use in a situation, as here, where a "clearly identifiable circumstance" (the weight of the drugs) may be determinative of the validity of the presumption. Allen v. County Court, supra, typewritten decision at 21.* The "facial" analysis applied in Allen, if ever appropriate (see Judge Timbers' concurring opinion), is certainly unnecessary and unjustified in this case.

The instant case represents the paradigm of the situation § 220.25(1) was directed at, and the paradigm of the situation in which the Temporary Commission to Evaluate the

* At the time of this writing the slip opinion has not yet been printed.

Drug Laws found the presumption was most reliable. This too was the view of the New York Court of Appeals in affirming petitioner's conviction. People v. Leyva, 38 N Y 2d 160, 167 (1975). Here more than two pounds of cocaine, with an estimated street value (today) of over \$40,000,* were found in an automobile but not directly on the person of any of the three individuals crowded into the front seat under which the package of drugs was resting in plain view. It seems beyond doubt that the cocaine belonged to someone, but none of the three occupants could readily be identified as the true owner.

It would be an absurd travesty of justice to pretend that no one owned the cocaine, and it surely flies in the face of all logic and experience to think that any of those three persons had neither interest in nor connection to the cocaine. The presumption in § 220.25(1) simply reinforces that unassailable conclusion, and codifies the natural inference which the jury could properly draw even without statutory authority. The presumption does not in any circumstance relieve the prosecution

* This estimate would vary somewhat according to the purity and quality of the mixture. This information was provided by the United States Attorney's office for the Eastern District of New York.

of its burden of showing proof of every element of the crime charged beyond a reasonable doubt. See Mullaney v. Wilbur, 421 U.S. 684 (1975).

Further, the chances are great that a person possessing this amount of cocaine would only take the narcotics into his automobile if he intended to bring the narcotics somewhere as part of a transaction; one would not be likely to go randomly driving around with two pounds of cocaine purposelessly in the car. This heightens the likelihood that all those in the automobile are in some way involved in the impending transaction, and makes it even less likely that one ignorant of both the drugs and the impending transaction would be in the automobile with the drugs. In contrast it has been argued that one might well carry an illegal hand gun in an automobile without having any particular intention of using it, and so that it might be expected that such a person would be more willing to let innocent strangers enter the automobile, or more willing to travel in the automobile with innocent strangers in a situation where no criminal activity is contemplated. Cf. Allen v. County Court, supra, typewritten decision at 16.

As the New York Court of Appeals noted, and as the trial judge charged the jury (T1179, 1182):

"The presumption is evidentiary and rebuttable, whether by defendant's own testimony or by any other evidence in the case, including the inherent or developed incredibility of the prosecution's own witnesses. A jury is not to be told that it must find defendants guilty if the prosecution proves that they and the drugs were present in a car together; it is only to be told that it may so find." People v. Leyva, supra, at 167 (emphasis in original).

The Court of Appeals also observed that, while proof by a defendant of another possible inference from the proven facts does not automatically negate the presumption, the trial judge does have the power in the proper case to issue a dismissal or direct a verdict if the presumption is conclusively rebutted. Id. at 169. This power has been exercised. See People v. Hargrove, 33 A D 2d 539 (First Dept. 1959); People v. Anonymous, 65 Misc. 2d 288 (Dis. Ct., Nassau Cty. 1970). Further, the New York courts have shown care in limiting both the applicability of the presumption and the evidence available to the prosecution in support of it. See People v. Wright, 41 N Y 2d 172, 176 (1976); People v.

Bennett, 47 A D 2d 322, 326 (First Dept. 1975); People v. Pantano, 46 A D 2d 914 (Second Dept. 1974).

The Court of Appeals examined the recent Supreme Court cases discussed above, and noted that it had applied in its own cases not merely the "more-likely-than-not" standard of Leary v. United States, supra, but rather a test requiring that the connection between the proven and the presumed fact "must assure 'a reasonably high degree of probability' that the presumed fact follows from those proved directly." People v. Leyva, supra at 166, quoting People v. McCaleb, 25 N Y 2d 394, 404 (1969).

The Court of Appeals also noted, as has the Supreme Court, see Leary v. United States, supra at 39; United States v. Gainey, supra, at 67, that since an evidentiary presumption must be based upon "common experiences or on reliable empirical data," People v. Leyva, supra at 166, the judgment of the legislature is entitled to great deference by the courts. Surely that deference is no more greatly merited than here where the New York Legislature has three times commissioned thoughtful consideration of the presumption in issue and all three times has ratified the approval of the presumption which

resulted from that consideration. The Court of Appeals, too, was convinced, and unanimously upheld petitioner's challenge to the presumption.*

This Court should exercise even greater deference to the combined judgment of the Legislature and the unanimous Court of Appeals that a sound factual basis exists for § 220.25 (1). Such deference would be consistent with this Court's limited role in exercising habeas corpus review, see Stone v. Powell, 428 U.S. 465, 474-81 (1976), and would be true to the Supreme Court's recently reaffirmed emphasis on the primacy of the States in criminal justice. See Patterson v. New York, supra. Considering that the petitioner has not adduced or suggested any empirical evidence whatever to cast doubt on the validity of the presumption, the three-times legislatively approved and unanimously judicially upheld enactment should not be overturned by this Court. Petitioner has utterly failed to demonstrate either logical or factual fallacy in the presumption, and this Court has been shown no conceivable reason to invalidate this statute.

* It should be noted that Judge Fuchsberg, who dissented as to the application of the § 265.15(3) gun presumption in People v. Lemmons, 40 N Y 2d 505, 516 (1976), wrote the unanimous opinion in People v. Leyva. See Allen v. County Court, supra, typewritten decision at 19 n. 18. The Allen court noted with approval the factual basis for the Court of Appeals decision in People v. Leyva, supra, and contrasted that factual support to what it perceived as a lack of factual support for the gun presumption. Allen v. County Court, supra at 19 n. 18.

Judge Neaher felt that the presumption was fully justified in the facts of this case, sufficient even to pass the "reasonable doubt" test which, as contended above, is stricter than the test which should properly be applied. He held:

"Whatever the case when a small quantity is found secreted in an automobile, this court finds it highly unlikely, as did the legislature, that those transporting a dealer's quantity of cocaine would permit anyone not connected with the drug to accompany them." A. 58 (emphasis in original, footnote omitted).

There was considerable evidence upon which the jury could have found petitioner guilty aside from the operation of the presumption, and indeed, as will be shown below, it did not in fact rely upon the presumption at all. First, as both the Court of Appeals and Judge Neaher noted, was the quantity involved, a total of two pounds and one ounce of cocaine. This is certainly an amount at which drug dealers would be at their most cautious, and where the chance of innocent presence is most remote.

Secondly, the narcotics in this case were not secreted in the trunk or hidden in the doors or body of the automobile.

To the contrary, the package was in plain view under the front seat of the automobile almost directly next to petitioner's foot. This location clearly supports an inference of control and hence possession by petitioner.* Certainly it tends to erase any doubt by the jury that petitioner was fully involved in the drug transaction and was by no means an innocent bystander.

Finally, the jury heard Jose Low's testimony as to his version of events. While the jury obviously did not fully credit Low's testimony, since it convicted him of first degree possession, at the same time it must have credited at least some parts of his testimony, since it acquitted him on the fourth degree possession charge involving intent to sell, while it convicted Leyva and Garcia on both counts. Low's testimony tended to show that Leyva and Garcia were acting together in the sequence of events (i.e. they entered the car together and both knew where they were heading in the automobile) and this testimony, together with the evidence as to the physical location of the drugs on the floor between Leyva and Garcia, supports the conclusion that Leyva was in actual possession of the package of drugs. In this case the statutory presumption only confirmed the actual facts of the case.

* The term "possess" is defined in New York law as "to have physical possession or otherwise to exercise dominion or control over tangible property." Penal Law § 10.00(8) (McKinney 1975).

POINT III

THE USE OF THE STATUTORY PRESUMPTION
IN THIS CASE WAS HARMLESS ERROR BEYOND
A REASONABLE DOUBT

In this case, as in Stubbs v. Smith, 533 F. 2d 64, 70-71 (2d Cir. 1976), the verdict of the jury demonstrates that the use of the statutory presumption was harmless error beyond a reasonable doubt.* Here petitioner challenges the use of the statutory presumption to prove possession of the drugs. But the jury convicted petitioner not only of simple possession (possession in the first degree, see T1158, 1258) but also of possession with intent to sell (possession in the fourth degree, T1158, 1259). As the trial judge properly charged the jury (T1183), the presumption at issue does not apply to intent to sell and the jury was called upon to find intent through a process of inference from all the evidence in the case without any statutory presumption. (T1183-1186).

The jury did find petitioner guilty of possession with intent to sell (as it did Garcia but not Low). To do so it had

* Although this argument was not raised in the District Court, this Court may consider it on any other ground in support of the order appealed from. Securities & Exchange Commission v. Chenery, 318 U.S. 80, 88 (1943); Jurinko v. Edwin L. Wiegand Company, 477 F. 2d 1038, 1045 (3d Cir), vacated on other grounds, 414 U.S. 970 (1973); Lum Wan v. Esperdy, 321 F. 2d 123, 125-26 (2d Cir. 1963).

to find beyond a reasonable doubt that petitioner had the requisite intent to sell. Therefore, it must also necessarily have concluded from the evidence apart from the presumption that Leyva possessed the drugs as well, since he could not have had the requisite intent unless he possessed the drugs. Thus it is clear that without the statutory presumption the jury found that petitioner did in fact possess the drugs. Thus, the use of the statutory presumption in the charge to the jury was harmless error beyond a reasonable doubt. Stubbs v. Smith, supra at 70-71. Schneble v. Florida, 405 U.S. 427 (1972); Harrington v. California, 395 U.S. 250 (1969); Chapman v. California, 386 U.S. 18 (1967).

In Stubbs v. Smith, supra, the petitioner sought to challenge the statutory presumption in New York law that presence of a weapon in an automobile shows knowing possession by every occupant of the automobile. Penal Law 1909 § 1899(3), now Penal Law § 265.15(3) (McKinney 1976-77 Cumulative Annual Docket Part). Id. at 65. The jury had convicted Stubbs not only of possession of a firearm but also of first degree assault, a crime which in the facts of that case could only have involved the weapon as to which the challenged presumption had applied.

Id. at 70. The Court found that because the jury had to find possession of the weapon to convict on the assault charge, and convicted on that charge, it must have found possession of the weapon not from the presumption but from the facts of the case, and the use of the presumption was mere harmless error. Id. at 70-71.

The exact same situation exists here. To convict petitioner of possession with intent to sell, the jury had to find actual intent to sell which could only be predicated on actual possession, aside from the statutory presumption. Since the jury found he had the intent to sell, clearly it believed that he did in fact possess the drugs, and the statutory presumption played no part in that finding. Its use on both counts of the indictment was harmless error as a matter of law and logic.

CONCLUSION

THE ORDER OF THE DISTRICT COURT
DENYING THE PETITION FOR A WRIT
OF HABEAS CORPUS SHOULD BE AFFIRMED.

Dated: New York, New York
November 30, 1977

Respectfully submitted,

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S U P P L E M E N T A L A P P E N D I X

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Q Have you also at sometime received courses of instruction with respect to the various types of narcotic drugs?

A Yes, sir, constantly.

Q Now, Officer, do you recall September 22, 1971?

A Yes, I do.

Q And on that particular date, Officer, you were assigned to what division of the Police Department of the City of New York?

A The Special Investigation Unit of the Narcotics Division.

Q Now, sometime on that date did you have occasion to be -- yes or no -- at the District Attorney's office?

A Yes, sir.

Q And that is located where?

A Across the street here in the Municipal Building in Kings County.

Q And more specifically on that date were you in a particular office of the District Attorney's office of the County of Kings?

A Yes, I was.

Q In what particular office?

A The Narcotics Bureau office.

Q Were you there by yourself, or were you there with brother officers?

A I was there with brother officers.

Q And what are the names of the brother officers?

A Well, it was Detective Edward Codelia, Detective John McClean and Lieutenant Gabe Stefania.

Q At that time he was a sergeant?

A He was still a sergeant, that's correct.

Q And you say you were in the Narcotics Office of the District Attorney's office?

A That's correct.

Q I see. And was there an Assistant District Attorney there at that time?

A Yes, there was.

Q What is his name?

A Martin Hershey, the head of the Narcotics Bureau of the Kings County District Attorney's office.

Q All right. Now, sometime thereafter, Detective Viera, did there come a time that you left the District Attorney's office?

A Yes, sir.

Q And can you tell us approximately what time it was that you left?

A I would say approximately 3:15 that afternoon.

Q Did you leave by yourself, or did you leave with someone else?

A I left with my brother officers and the District Attorney, Martin Hershey.

Q All right. And when you left the office, did you proceed to a location?

A Yes, I did.

Q How did you get to that location?

A I drove my auto and I had Lieutenant Stefania in my car at that time. Detective McClean was following me in his auto, and he had Detective Codelia and Mr. Hershey in his car.

Q Now, Officer, did you proceed to a location here in Brooklyn on that date?

A Yes, I did.

Q And what location did you go to?

A In the general area of the Brooklyn side of the Williamsburg Bridge.

Q More specifically, can you give us the street, Officer?

A South Fifth Street.

Q And do you know the connecting streets?

A Yes, that's Havemeyer Street.

Q And do you know what the other street is?

A Marcy Avenue.

Q All right. Now, where in particular did you go with respect to those -- to that location that you just mentioned?

A I parked my auto practically seventy-five feet west of Marcy Avenue on the south side of South Fifth Street.

Q All right. Did you know at that point when your automobile was parked where your brother officers were in their automobile?

A Yes. They were at the exit ramp of Williamsburg Bridge off Havemeyer by an Army recruiting station.

Q Now, while you were at that location, Officer, what was the very first thing that happened after stopping your automobile on South Fifth Street -- you say seventy-five feet west of Marcy Avenue?

A That's correct.

Q Tell us what happened at that point?

A Well, I spoke to my brother officers by radio.

Q You received a call over the radio?

A At approximately --

Q What time was that?

A At about five minutes to 4.

Q And that was a call from what officer?

A From Detective McClean.

Q And in that conversation, Detective Viera, did Detective McClean --

MR. SONENSHINE: If the Court please, I'll object to any questions relating to a conversation.

THE COURT: I'll hear the question first.

Q When Detective McClean spoke to you on the radio, that was a two-way radio?

A That's correct.

Q Yes or no, did he give you certain information?

A Yes, sir.

MR. SONENSHINE: Objection, if the Court please.

THE COURT: I'll allow it.

Q What did you do upon receiving this information from Detective McClean?

A I looked around.

Q Where did you look to, Officer?

A Toward the Williamsburg Bridge, to my rear.

Q And that would be toward what street?

A That would be toward Havemeyer.

Q And you are now on --

A South Fifth Street.

Q Continue.

A South Fifth Street is a one-way street. All the traffic that would be coming from my rear would have to pass me. I received a radio communication from Detective McClean.

Q Yes. Now, what did you do as a result of that?

A As a result of that, I turned and looked in the direction of the flow of traffic, and I saw a Chevrolet approaching me; and bore Florida license plates. I pulled my auto out and cut that car off as it was proceeding on South Fifth Street.

Q And then what is the very, very next thing you did after stopping the auto?

A I got out of the auto and approached the passenger side of the Chevrolet. I opened the door. I pulled out the defendant in this case, Mr. Leyva.

Q Will you point him out, please.

A He's the one sitting next to the female, Carmen Garcia, to the right of her.

Q Yes.

MR. BARRA: Let the record so indicate, Your Honor.

A I pulled him out with my left hand, and I retrieved from the floor a manila envelope which was under the seat. I then identified myself. I opened the package and placed the defendants under arrest.

Q Now, did you open the package, Officer?

A Yes, sir.

Q And what did you see?

A I saw it contained two plastic envelopes of white powder.

Q A white powder, which you believe to be what?

MR. SONENSHINE: Objection, Your Honor.

THE COURT: Sustained. That's leading.

Q Now, Officer, with relation -- you say there were three people in the car?

A That's correct.

Q And will you identify the three people that were in the car?

A Yes. They are here. Mr. Low.

Q What was he doing in the car?

A He was driving the auto.

Q Yes. And where was -- you mentioned another name?

A Mr. Leyva was sitting on the passenger side, and Carmen Garcia was seated in the middle.

Q Now, Officer, when you -- as you opened the door of this automobile, which you say was a Chevrolet, a 1969 --

A That's correct.

Q Now, when for the first time did you see this manila envelope in terms of the events you have described?

A When I opened the door.

Q And did you see all of the envelope?

A No, sir.

Q Did you see a part of it?

A Yes, I did.

Q And what part of it did you see before you actually touched it?

A The top portion, I would say, approximately three inches, three to four inches.

Q And that portion was producing out from under the seat?

A Yes, sir.

Q Now, of that three-or-four-inch portion that you first observed, were there any markings or writings on that particular portion?

A No, sir.

Q It was a black manila envelope so far as your view of it was at that moment?

A Yes, sir.

Q All right. Now, having taken Mr. Leyva out of the car, did you immediately reach toward that envelope?

MR. ELLISON: I object to this. He's going into probabilities.

MR. BARRA: He is telling what he did, Your Honor.

THE COURT: I think it would be a little more helpful to us -- I know what you're trying to do, Mr. Mullaly, and that is to give us the text book step-by-step procedure and all the various scientific tests; but we do have now Exhibit Number 1 before this Court, on which you did work, and we would like to know what you did on this sample we have here.

THE WITNESS: I understand. Yes. All right. The next step would be to apply some Stannous chloride and to observe whether the color change disappeared or not. The next test would be to make a platinum chloride crystal and to look at it underneath the microscope, which I did; and in both cases the tests were positive.

Q And what were your findings?

A That cocaine was present.

Q And is cocaine a narcotic drug within the purview of the public health laws and penal laws of the State of New York?

A Yes.

MR. ELLISON: I object to that, if the Court please.

THE COURT: I'll sustain your objection, Mr. Ellison.

Q Now, Officer, can you tell us the weight of People's Exhibit Number 1?

A I'd have to take a look at that (indicating).

MR. BARRA: Let the record indicate that I am turning over the Officer's laboratory report.

Q I ask you now, Officer, to look at the laboratory report. And does that refresh your recollection?

A Yes, it does.

Q And will you now tell us the weight, without looking at the report?

A One pound, 1/2 ounce of white powder.

Q And that would be -- would you break that down in ounces?

A Sixteen-and-a-half ounces.

Q All right. Now, Officer, we ask you at this point to break open People's Exhibit Number 1.

MR. BARRA: Does someone half a knife?

(Knife handed to witness.)

Q All right.

MR. BARRA: Will you let the record indicate, Your Honor, that the Officer is breaking -- is opening the package -- that would be what end?

THE WITNESS: This would be the side.

Q The side of the envelope?

A Right.

Q And will you describe to the Court what you have just removed from People's Exhibit Number 1?

A All right. 1 is a plastic-type bag.

Q Is that a clear plastic bag, Officer?

A Yes, it is.

Q You recognize that bag as having performed an analysis?

A Yes, I do.

Q And how do you determine that?

A It had my seal on it, with my initials, the police laboratory number and the date I performed the analysis.

MR. BARRA: Now, Your Honor, at this time I ask that that package be exhibited to each of the jurors, Your Honor.

(Handed to the jury.)

Q What else have you removed from People's Exhibit Number 1?

A An empty yellow manila envelope.

Q And does that envelope contain any writings, Officer?

A No, not any writings by me. It does have some writing on it

Q All right. Nothing on that envelope in your handwriting?

A No.

Q I see.

(The jury is looking at the Exhibit.)

THE COURT: I think you can proceed, Mr. Barra.

MR. BARRA: All right, Your Honor.

Q Now, Officer --

MR. BARRA: May I at this time, Your Honor, as part of People's Exhibit Number 1 -- I asked before that the contents of the package also be received. I now specifically ask that the envelope that was contained in People's Exhibit Number 1 be marked 1-A, Your Honor.

MR. SONENSHINE: The same objection as previously noted, Your Honor. No proper foundation has been laid.

THE COURT: Overruled. Mark it.

(Marked People's Exhibit 1-A.)

MR. ELLISON: I take it, Your Honor, that Your Honor is dealing adversely and we all have an

exception.

THE COURT: This is what overruled means, I think.

MR. ELLISON: I didn't hear that.

THE COURT: Oh, I'm sorry.

Q Officer, I now show you People's Exhibit Number 2 marked for identification and ask you, do you recognize People's Exhibit Number 2?

A Yes, I do.

Q And can you tell us under what circumstances it came into your possession and what date, Officer?

A I received this from the supervising sergeant on the 24th of September of last year.

Q And did you -- well, could you see where the sergeant removed that package from?

A Yes. He removed it --

Q Were you present?

A He removed it from the safe in the police laboratory.

Q In your presence; is that correct?

A Yes, he did.

Q All right. Now, looking at People's Exhibit Number 1, you performed certain tests on it; is that correct?

A Yes, I did.

Q And as required, you opened it and re-sealed it; is that correct?

A Yes.

Q Now, is that envelope in the same condition as when you returned it to the evidence room?

A Yes, it is.

Q And are there any changes on there?

A No, no changes on this.

Q Well, whose initials do you see on the envelope, and will you describe it?

A I see my own: "J.M."

Q And where is that located?

A On the seal, on the bottom half of the envelope. My own initials, police laboratory number and the date the analysis was performed on.

Q And do you see any other writings or notations?

A Yes, brown gum tape with the initials "R.V.," 1864, 9/23/71.

Q And except for that, it is in the same condition as when you received it?

A Yes, it is.

MR. BARRA: At this time, Your Honor, I ask that the envelope and the contents be received into evidence as People's Exhibit Number 2.

MR. SONENSHINE: The same objection as previously stated.

THE COURT: The same ruling.

(Handed to counsel.)

(People's Exhibit Number 2 for identification now People's Exhibit Number 2 in evidence.)

Q Now, Officer, with respect to People's Exhibit Number 1, did you perform certain tests on People's Exhibit Number 1?

A Yes.

Q I'm sorry, People's 2. I'm sorry.

A Yes, I did.

Q I used one. It should be 2. Now, Officer, tell us the nature of your examination and your findings thereof and what tests you performed?

A I determined that an alkaloid was present, and I determined that it was a cocoa alkaloid, and I performed a microscopic crystal.

Q All right. And what were your findings, Officer?

A I found that cocaine was present.

Q And can you give us the weight, Officer?

A Yes. It was one pound, one/half ounce, white powder, cocaine.

Q Can you break that down to ounces?

A Right around near the fire hydrant.

Q And if I were to point here, would that be correct (indicating)?

A That would be correct.

Q All right. And then what did you see happen after Detective Viera's vehicle pulled out?

A I got out of my car. I walked up to the driver's side.

Q The driver's side of what vehicle?

A Of the vehicle in question, the 1969 gold Chevrolet with the Florida license plates.

Q How many people did you see?

A There were three people in the automobile.

Q Do you see those three people in the Courtroom today?

A Yes, I do.

Q Would you point them out, please?

A One -- the man --

MR. SONENSHINE: There is no issue about the fact that Carmen Garcia was in the automobile.

THE COURT: I think Mr. Barra should proceed with his examination.

Go ahead.

A May I point them out?

THE COURT: Yes.

A Not the man with the blue suit, but the man inbetween there with the mustache, grey suit, black tie, the man with the green shirt and the lady with the blue dress on.

Q Can you tell us how they were seated in the vehicle?

A Yes.

Q Would you please, Officer?

A The man to the furthest left was driving the automobile.

MR. ELLISON: May the record indicate who he is talking about now?

THE COURT: Mr. Jose Low?

THE WITNESS: Low, Miss Garcia was in the middle of the automobile, and the other gentleman was on the other side.

Q Which would be considered what side of the vehicle?

A It would be like the -- to the right of the driver.

Q All right. Now, what was the very next thing that happened? You say you got out of your vehicle?

A I got out of my vehicle, walked to the driver's side. I had my gun at my side, and I had my shield in my hand, and I said, "Police." I looked into the car.

who is sitting on the left between his counsel and the interpreter.

Q Where was Garcia sitting in the car?

A Garcia was sitting in the front passenger seat in the middle, and Leyva was to the right of the passenger.

MR. BARRA: I have no further questions.

THE COURT: Any further questions?

MR. MARKOWITZ: No, Your Honor.

THE COURT: All right.

THE WITNESS: Thank you.

(Whereupon the witness stepped down from the witness stand.)

THE COURT: Next witness.

MR. BARRA: At this time, Your Honor, this is the People's case, Your Honor.

THE COURT: The People rest?

MR. BARRA: The People rest.

THE COURT: Side bar, please.

(Whereupon there was an off-the-record conference at the bench.)

THE COURT: In giving you the outline of the trial in this Court, gentlemen, I didn't go into certain features of the trial because you are not participants in that portion of the trial.

from Mr. Leyva if he's missing anything so we can have it repeated.

MR. ELLISON: Would you repeat what the judge has said to the defendant?

DIRECT EXAMINATION

BY MR. MARKOWITZ:

Q Mr. Low, how old are you?

A Forty-six.

Q And where were you born?

A Oriente, Cuba.

Q And how long did you live in Cuba?

A Until '65, 1965.

Q And, what was your occupation in Cuba?

A I was a businessman. I had restaurants.

Q Why did you leave Cuba?

MR. BARRA: Objection, your Honor.

THE COURT: I'll sustain.

MR. MARKOWITZ: Respectfully except.

Q Now, I show you this document, Mr. Low, from Cuba.

A This is the --

MR. BARRA: I'm going to object, your Honor.

Counsel said "I show you a document."

THE COURT: No question.

Low (Deft) Direct

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MR. BARRA: Without a question so as to what the document was.

Q What is this document?

MR. BARRA: I'm going to object, your Honor.

THE COURT: I'll allow that.

A Good conduct. Good conduct certificate.

MR. BARRA: Objection, your Honor.

THE COURT: I'll allow it. Go ahead.

MR. MARKOWITZ: Now, I offer this as Defendant's Exhibit A for identification.

MR. BARRA: Objection, your Honor. Refused in evidence.

THE COURT: It's for identification.

THE CLERK: Defendant's A for identification.

THE COURT: Mark it.

(Document referred to was marked Defendant's Exhibit A for identification)

MR. MARKOWITZ: I now offer this into evidence.

MR. BARRA: Objection, your Honor.

THE COURT: Sustained.

MR. MARKOWITZ: Respectfully except.

BY MR. MARKOWITZ:

Q Mr. Low, were you ever convicted of any crimes in Cuba?

A I never committed any crime.

Q Were you ever convicted of any crimes in the United States?

A Never in my life.

Q Mr. Low, are you married?

A Married.

Q Do you have children?

A Three.

Q And what are their ages?

MR. BARRA: Objection, your Honor, as to their ages.

THE COURT: I'll allow that.

A One is 18. One girl 8. And the boy will be 6.

Q And, where were they born?

MR. BARRA: Objection, your Honor, has no relevancy.

THE COURT: I'll sustain that.

Q Now, Mr. Low, what is your -- your immigration status in this country?

A Resident.

Q You're a permanent resident, is that correct?

A Permanent resident.

Q Now, Mr. Low, when you came to this country --

THE COURT: May I just interrupt you, Mr. Markowitz?

MR. MARKOWITZ: Yes.

THE COURT: As to the status, **as** permanent resident, are you an alien or a citizen?

THE WITNESS: Alien. Alien resident.

THE COURT: Have you -- have you been in this country long enough to be a permanent resident?

MR. MARKOWITZ: He is a permanent resident.

THE COURT: To have acquired the eligibility for citizenship status?

THE WITNESS: I was going to apply for citizenship last year.

THE COURT: How many years is required?

THE WITNESS: Five years.

THE COURT: You have been here five years?

THE WITNESS: More.

THE COURT: Thank you. That's all I wanted to know.

Q How many years have you been here?

A I came on December 22, 1965. By boat.

Q Isn't it a fact that you speak some English but you feel more comfortable speaking Spanish, is that right?

A My English is strictly what I use in my work and it's not suitable to speak here.

Q Now, when you came to this country in 1965, where did you reside?

MR. BARRA: Your Honor, I'm going to object, your Honor, this is too far remote, 1965, we're talking here about 1971, your Honor. It's too far remote in time.

THE COURT: Are you using this as foundation?

MR. MARKOWITZ: Yes, Judge.

THE COURT: Proceed.

A In New Jersey.

Q How long did you reside in New Jersey?

A Until June 16, 1970.

Q Now, what was your occupation in New Jersey?

A I started to work in a plastics factory. From 6 o'clock in the evening to 6 o'clock in the morning. Then I changed work, and I worked in a beer can factory. And then I established a restaurant. Which was called "20th Century." In West New York.

Q That's West New York, New Jersey?

A West New York, New Jersey. I sold it. And I bought another one. In Union City. 536 Lincoln Street.

Q And, I show you this --

MR. BARRA: Your Honor, I think he's asking a question, he's answering, your Honor.

Q I show you this and ask you what is this?

A This is a permit to work as a bartender and serve liquor in Union City.

MR. BARRA: Your Honor, I'm going to object to that, your Honor, has no relevancy on this case whatsoever.

THE COURT: I have taken the testimony, don't offer it. I'll sustain his objection if you do. Or offer it and I'll sustain his objection.

MR. MARKOWITZ: I offer this into evidence as Defendant's Exhibit B.

MR. BARRA: Objection, your Honor.

THE COURT: Sustained.

Q Now, I show you this document, what is it?

A This is a police car from Union City.

MR. BARRA: Objection, your Honor.

Q And is that a card permitting you to
work --

MR. BARRA: Just a moment, I have an
objection the Court has not ruled as yet.

THE COURT: I will take its identification;
I'll allow it. Go ahead.

Q And is this a card permitting you to
work in a bar in -- or in a night club in Union City?

MR. BARRA: Objection, your Honor.

THE COURT: I'll allow it.

A This is also to sell liquor.

MR. MARKOWITZ: I offer this as Defendant's
C.

MR. BARRA: Objection, your Honor.

THE COURT: Identification or evidence?

MR. MARKOWITZ: Well for evidence, Judge,
I offered this. I don't know whether it was
marked, this I offered -- this card I offered
as Defendant's B and this I offered as Defendant's
C in evidence.

THE COURT: Did I not rule on B?

MR. MARKOWITZ: I think you sustained the
objection, but I don't think they were marked,
Judge.

THE COURT: For identification marked; both B and C. The small green card B and the other C.

(Cards referred to were then marked Defendant's Exhibit B and C respectively for identification.)

MR. MARKOWITZ: Now is it your Honor's ruling that you sustained the objection when I offered them into evidence?

THE COURT: I have allowed the testimony, I've just excluded them from exhibits, all right?

Q Now, Mr. Low, have you continually worked since you've been in this country until the time of your arrest?

A All the time.

Q And have you continually lived with your wife and three children?

MR. BARRA: Objection, your Honor, I object to this, your Honor, as prejudicial.

THE COURT: I'll allow it.

A I have never separated from them.

Q Now, did there come a time when you left New Jersey and went to Florida?

A Mr. Guillermo Aquillo (phonetic) who is the owner of

Broadway Sandwiches gave me a contract for Miami Beach.

MR. BARRA: Your Honor, I'm going to object to the question. I object to the answer, your Honor, as not being responsive to the question that was asked by Mr. Markowitz.

THE COURT: Now look, Mr. Barra, you are technically absolutely correct. We do have a translator here; we have a language handicap. I am going to be a little bit lenient on the technicalities here. So, this time, I don't believe it's anything more than establishing a long-winded answer to what could have been a simply answer to a simple question; I'll allow it. But in the future, I'm sure if I'm too liberal, you will straighten me out.

MR. BARRA: Thank you, your Honor.

Q Now, when did you go to Florida?

A June 16, 1970.

Q And where did you reside in Florida?

A I went with my family and to work to the Patrician Hotel.

Q And what kind of work did you do in Florida?

A Cook. *And in charge of the dining room.

Q And, what occupations did you have in Florida?

A When I left there, I started as a cook in the Restaurant Torreador.

Q And were you continuously employed while you were in Florida?

A Working.

Q Now, I show you this document. What is it?

A This is from the Miami Police.

MR. BARRA: Objection, your Honor, to this document.

Q What is it?

A This card you have to take out to be able to work in restaurants.

Q And is it a permit to work in a bar?

MR. BARRA: Objection, your Honor.

THE COURT: I'll allow it.

A It's a permit.

Q And it's given to you by the police, is that right?

A Yes, you have to take your fingerprints and take it from the police.

MR. MARKOWITZ: Well, I offer this for identification as D. I now offer this into evidence.

MR. BARRA: Objection, your Honor.

THE COURT: Sustained.

MR. MARKOWITZ: Respectfully except.

Q Now, is it a fact that some time you worked for the Federal Bureau of Investigation?

MR. BARRA: Object to this leading question, your Honor.

THE COURT: I'll sustain it. Form.

Q Did you ever work for the Federal Government?

A I was working one week for the F.B.I.

Q And what did you do for them?

A I was looking for some persons at the United Nations who were communists.

Q And did you get paid from the F.B.I. for this?

MR. BARRA: Objection, your Honor.

THE COURT: I'll allow it.

A No, they didn't pay anything and I did it for nothing.

Q Now, did there come a time that you left Florida?

A I left Florida on September 20th.

Q Now, why did you leave Florida?

THE COURT: What year?

Low (Deft) Direct

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THE WITNESS: Last year.

Q That would be '71?

A '71.

Q Now, did you leave Florida?

A The work that I was doing at that time was very poorly paid and I had to work 13 and 14 hours.

Q What kind of work were you doing?

A Cook and in charge of the restaurant dining room.

Q Which restaurant?

A A new one that they opened, The Elegante Restaurant.

Q And did you come to New York from Florida?

A New York and I was going over to New Jersey.

Q Now, by what means of transportation did you come to New York on September 20th?

A I came in a car.

Q Whose car?

A Orlando Morales.

Q Who is he?

A A friend of mine whom I know for a long time.

Q And, when did you arrive in New York?

A The 21st.

THE COURT: Of what?

THE WITNESS: September, 1971.

Q And what time did you arrive in New York?

A About 9:30, 10 o'clock at night.

Q Now, by the way, do you know a fellow
by the name of Sepero?

MR. BARRA: Objection, your Honor.

I'm going to object to this.

THE COURT: I'll sustain the objection
at this time.

MR. MARKOWITZ: Judge, subject to connection.

THE COURT: At this time do you want a
bench conference only, Mr. Markowitz?

(Discussion off the record at the side
bar.)

Q Mr. Low, what time did you arrive in
New York on September 21st?

A In New York? 9:30, 10 o'clock at night.

Q Now, where did you spend the night?

A In the house of Mrs. Gladys Naranjo.

Q Where does she live?

A 191 Fort Washington Avenue in New York.

THE COURT: What's the last name?

THE WITNESS: Naranjo.

Q Now, I take you to September 22nd. Did

you go to New York on September 22nd? Were you still in New York on September 22nd?

A I was in New York.

Q Now, could you tell us what happened then?

A I got up around 11 o'clock in the morning. I was going towards the center of the City.

Q Why?

A To take the bus at the bus terminal to go to New Jersey.

Q Where is the bus terminal?

A By 9th Avenue and around -- between 9th Avenue around 42nd, 43rd Street.

Q Now, where were you going?

A To New Jersey.

Q Then what happened?

A I met Mr. Sepero.

Q Now, what's Sepero's first name?

MR. BARRA: Your Honor, I object to the use of the name Sepero.

THE COURT: Pardon?

MR. BARRA: I object to the use of the word Sepero.

THE COURT: Well, you met a person named

Sepero, I'll allow it.

Q What is Sepero's first name?

A I don't know his name.

Q Is it you don't know his first name,
is that right?

A The first name I don't remember.

THE COURT: Where did you meet this man?

THE WITNESS: I met him on Broadway and
42nd.

Q Now, did you know Sepero prior to this
incident?

A I met him at the restaurant about -- I knew
him for about three or three and a half months. And
we ate in the restaurant.

Q Which restaurant?

A Elegante Restaurant.

Q And where is that located?

A In Miami.

Q Is that where you met him for the first
time?

A Yes, it was there.

Q How often did you see him in the Elegante?

A He went there everyday.

Q Was one of your customers?

A He was one of the customers.

Q And, did you converse with him in New Jersey?

A Yes, I talked to him and the wife and the children.

Q Now, getting back to September 22nd,
you say you met Sepero at 43rd Street and Broadway --
42nd and Broadway.

A 42nd and Broadway.

Q Okay. Then what happened?

A I was standing and looking. He passed by and
he saw me. And he said Jose. And I looked at him.
And he asked me where are you going? I said I was
going to New Jersey. And he said if he wanted to he
would give me a ride. As it was easier for me, to
go there by car, I accepted.

Q By the way, why were you going to New Jersey?

A I was going to renew the license which had
expired. And also to collect some money that was
owed to me. And I was going to Crown, the can factory.
Crown Can Factory. Because I had a blow, an injury
to my back when I was working there. And this
problem has not been solved yet.

Q Now, what did Sepero say to you, what
did you say to Sepero when you met him?

MR. BARRA: Objection.

THE COURT: Sustained.

A I accept.

THE COURT: The jury will disregard that question and answer.

Q Now, you say Sepero offered you a ride, is that right?

A He offered to take me.

Q And then what happened?

A He said first he had to take care of an errand. A matter. And he took me to a hotel.

Q Where?

A I don't know the address.

Q But approximately what street?

A 20 an odd number.

MR. BARRA: What was that?

THE COURT: In the 20s.

A And there was no parking space. He stopped the car in front of the hotel and he said to sit behind the driver's -- behind the wheel. So that he shouldn't get a ticket by the police.

Q Was the owner of that car?

MR. BARRA: Objection, your Honor.

THE COURT: Unless he knows. Ask him

that question first.

Q Did Sepero tell you he was the owner of that car?

A He is the owner of the car.

Q Okay. Then what happened?

A He went upstairs in the hotel. And he came with -- came down with two persons.

Q Who were those two persons?

A The ones who are sitting over there.

Q You mean Garcia and Leyva?

A Yes.

Q Then what happened?

A And he introduced me to them and he said that they were friends of his.

Q Had you ever known them before?

A Never in my life.

Q Then what happened?

A And he said he would stay in the hotel to take care of a matter. If I could do him the favor to take them to Brooklyn. I said how long will this take? And he says about half an hour. And then I went towards Brooklyn without knowing my way. And she gave me directions.

Q Did he tell you where you were going in

Brooklyn?

A No.

Q And, by the way, when you were in the car, when you got into the car, did you see a package, a manila package?

A No, I didn't see -- I didn't see any package.

Q Then what happened?

A When I crossed the bridge, about six, five or six blocks, there was a car going in front of me. And I was going slowly, I saw that the car was going out from behind the place where the car was -- had been parked. The car went back. And let pass the car that was going in front of me. And then again the car crossed in front of me. I thought that he was going to park correctly in there. And I stopped there. When I -- a policeman came up to my door, a door with the gun and told me that I was under arrest.

Q By the way, did Sepero or anyone tell you where you were going?

A No, the directions I got from the lady. The street.

Q Did Sepero tell you there were drugs in the car?

A I wouldn't get into the car if there were to be

Q And what is this street going down?

A South Fifth Street.

Q All right and what's this street over here?

A Marcy Avenue.

Q Did you hear the police officer say that your vehicle was stopped by the fire hydrant between these two streets?

A Well, I don't know about these streets here, but all I remember is from the bridge until I was arrested was about four or five blocks because I was counting.

MR. BARRA: All right, go back to the stand. Go back to the witness stand.

Q Well now, from the -- during the half an hour that you were in the vehicle before you were stopped by the police, did you have any conversations with Garcia and Leyva as to where you were going to go in Brooklyn?

A The only conversation that we had was with Leyva. And he told me about, that he also came by boat and the problems that he had. And, every so often I asked the -- I asked for directions to the lady whether I was on my right way.

Q And did the lady give you directions?

A She said to go this way or that way.

Q And, well when you got off the bridge, did she tell you which way to go?

A She said to make a right turn.

Q And did you make a right turn or did you go straight ahead?

A I -- get off the bridge, I remember crossing a wide avenue about two or three blocks from there.

Q Now, when -- when your automobile -- when the automobile was stopped, you were the driver, is that correct?

A Yes, sir.

Q And did you see a police officer who you now know to be Detective Viera come over to the passenger side of the vehicle?

A Yes.

Q And did you see him take Leyva out of the automobile?

A No, at the same moment I was taken out too and I don't know.

Q You mean that two police officers came up and took you out and took him out, is that what you're trying to tell us?

THE CLERK: All the defendants are present with counsel. The People are present by Mr. Barra.

(The roll of the jurors was called by the Clerk.)

THE CLERK: All present, sir.

Gentlemen, the judge is about to begin his charge. Please pay close attention to what he has to say.

THE COURT: Good morning, gentlemen. We have now reached the point in the trial where the judge's charge to the jury will be given. And, the purpose of the charge is to acquaint you with the law that you need to know about. In order to sift through the testimony and, examine the facts and arrive at a verdict of either guilty or not guilty for each of these three defendants on each of the two charges levelled against these three defendants.

Now, we have heard a lot of reference by counsel to law in the course of this case. Most recently in the summations of yesterday. Now, normally I stop that. In this case because of the involvement of the presumption and the delicacy legally of that, I did allow a greater latitude. Unfortunately some of the law that you heard was not accurate, some of it was close to the truth, and not exactly there. So therefore, I will go over the law, and I would ask you to try to dispel

all of what you've heard relative to the law, and sort¹¹⁵ of develop the posture that you're going to accept the law from me.

Because it is my job, you see, to give you the law as it exists today. That portion of it that relates to the indictment that we are considering. Of course, I am not going to give you a course in the law.

Now, it is your function to evaluate and assess the testimony and arrive at the facts here and determine the guilt or innocence of the defendants. Now, it is your duty to abide by your oath to come up with a verdict that is consonant with your conscience and with the facts and with the law. And of course, we implore you to do that.

I think I may have said to you somewhere along the course of our acquaintanceship here that it is your job to be objective, impartial, factual. It is your job to not let sympathy enter into your judgment of acquittal or conviction. You must look at this thing coldly and objectively in accordance with the testimony and the law. And it is my job, I told you, I'm sure, to give you that law as it exists today and as I know it to be, and as it applies to this case. And you must accept that law from me.

Just as I can assure you we all are constrained to accept your verdict as final. Now, again, this may be repetitious, but I want to read you the indictment.

It's the People of the State of New York against Carmen Garcia, Jose Low and Widelto Leyva. First count. The Grand Jury of the County of Kings by this indictment accuse the defendants of the crime of Criminal Possession of a Dangerous Drug in the First Degree. Committed as follows: The defendants on or about September 22, 1971, in the County of Kings, knowingly and unlawfully possessed a narcotic drug, consisting of a preparation, compound, mixture and substance of an aggregate weight of sixteen ounces or more, and more, containing any of the respective alkaloids and salts of cocaine.

Second count. The Grand Jury of the County of Kings by this indictment accuse the defendants of the crime of Criminal Possession of a Dangerous Drug in the Fourth Degree committed as follows: The defendants, on or about September 22, 1971, in the County of Kings, knowingly and unlawfully possessed a narcotic drug, to wit cocaine with intent to sell the same.

Now, these indictments are charges of a crime committed. For the record, I would like to read to you

what the Penal Law says about each of these allegations in that indictment. The First Degree Possession charge. Section 220.23 of the Penal Law. And it says: "A person is guilty of Criminal Possession of a Dangerous Drug in the First Degree when he knowingly and unlawfully possesses a narcotic drug consisting of one or more preparations, compounds, mixtures or substances of an aggregate weight of sixteen ounces or more containing any of the respective alkaloids or salts of heroin, morphine or cocaine. Or containing raw or prepared opium."

Cocaine is the narcotic that is alleged to be involved in this case.

Now, the second count in the indictment is Criminal Possession of a Dangerous Drug in the Fourth Degree. That is a lesser crime. And it reads as follows: It's section 220.15 of the Penal law, and it says this.

"A person is guilty of Criminal Possession of a Dangerous Drug in the Fourth Degree, when he knowingly and unlawfully possesses a narcotic drug with intent to sell the same.

There are other parts of that statute that relate to other ways in which you can violate the statute, but this is the one alleged here in this indictment.

It involves knowingly and unlawfully possessing a narcotic drug in this case, cocaine, with the intent to sell.

Now, you see, there are differences here. In these possession crimes. The first degree crime, per the statute talks about a weight, a pound, 16 ounces of cocaine and other things. Here we are involved with cocaine. Where the defendants to be found guilty, must be knowingly and unlawfully in possession of sixteen ounces of cocaine. That's the first count in the indictment. And that is the first degree possession charge. Much more serious one.

The second count in the indictment, the fourth degree is a D felony as opposed to an A felony. And it too has in it the concept of possession - knowingly possessing, unlawfully possessing it. But it doesn't talk about quantity. It can be a smidgen, it can be a grain, an ounce, anything, with intent to sell. Intent to sell is the part of the second count of the indictment that differs from the first count in the indictment. The first count is weight, the second count is possession of any quantity with intent to sell.

Now, bear in mind too, that these are not charges of the commission of crime at different times, at different places. We are talking about one and the same

transaction, the afternoon of I believe, September 22, 1971.

All of the facts that you've heard testified to in this case relate to the one incident, the one episode from which the indictment was prepared based upon the testimony presented to it, and it was found by that Grand Jury that there were two crimes, that were worthy of being charged, being aired before this Court at this kind of a trial.

Now, there is the question in both, however, I indicated that there was a commonness even though they are indifferent categories of severity and importance, there are things in common to both. Possession, and knowingly possessing it, and unlawfully possessing it.

Those three concepts run to both of them. So let's explain what they are. What we mean by them for the purposes of your deliberations in this case. Possession can be of two kinds. Possession can be actual possession or constructive possession. And I think counsel very properly told you the difference there, so I'm just going to touch it lightly.

If the thing is in your back pocket, if it's in your hand, if it's under your arm, it's somewhere's

on your person, that's actual possession of it. Constructive possession is the opposite in the sense that it is not necessarily physically on your person, but it is within your control or dominion. You have the say about it. Or, you are chargeable with actually having possession. By some figment of the law, by some statute, by some presumption, and we will talk more about that in this case.

But the possession that we are talking about in this case is not possession on the person as to either Carmen Garcia, or Low or Leyva. It's possession that we deem to be constructive possession, which the law by virtue of creating a presumption says they had on their person. In effect.

Knowingly, that is a word that permeates the language of both of these sections, and what do we mean by knowingly? We mean that the person has to have knowledge, actual knowledge of the fact that it is in his possession or the circumstances and facts have to be such as to legally charge him with that knowledge.

Now, here in this case, again, there has been no evidence of actual knowledge, but we are going again from the presumption about which I will talk about later at greater length. But they're charging the

persons in this vehicle with knowledge of it as if they actually did possess knowledge and there was testimony as to their actually knowing it.

Unlawfully. They are charged in both counts of the indictment with unlawfully possessing this narcotic. Now, surely it comes as no surprise to you that there are some narcotics that are lawfully in the possession and control of certain people. Hospitals are lawfully permitted to have certain kinds of narcotics that are unlawful for others to have. There are patients of doctors who by prescription are able to get certain narcotics, and where they have such a prescription, of course, they would have a legal right to possess narcotics that otherwise would be unlawful to have.

Now, in this case, the people through the indictment are charging these defendants with unlawful possession of narcotics of the 33 ounces of cocaine that they have testified they found in the vehicle in which these defendants were riding. So we have here now, an allegation by the People that there were -- there was possession, it was knowing possession, and it was an unlawful possession. That is what the District Attorney - the People of the State of New York through the District Attorney are alleging in this case, and that's what this

case is all about.

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Now, that I think, explains the terms used in the indictment in both counts, and I will talk more about the second count as we reach it a little later on in this discourse.

Now, much has been said by counsel about the meaning and the significance of an indictment. And I think we have all said it before, but for the purposes of this record in charging you, I want to indicate again, that an indictment is just an accusation. And the reason we say it is just an accusation is that it is based upon evidence that is presented to the Grand Jury. By an Assistant District Attorney in some cases, at which time the defendants are not present, they are not represented by lawyers, there is no cross examination of the witnesses, who have testified before the Grand Jury.

There's nothing wrong with this. This is perfectly proper. This is our system, our Grand Jury system of finding indictments or not finding them. But it is hardly enough under our system of American jurisprudence to result in anything more than just that. It's an accusation that indicates that this is a matter that should be tried in a court of law before a competent jury.

Now the accusation set up in this trial has been

11 Jury charge

set up. We have now gone to trial, we have ^{11E5} a judge presiding, we have a jury impanelled, and these charges are to be tested here and now. We will have, we have had confrontation of witnesses, we have had cross examination, all of the other safeguards regarding the propriety of the introduction of testimony in this trial and, this is just one of the many safeguards that the trial procedure provides.

Now therefore, we have, because of the nature of the accusation and what an indictment really means, we have developed in our system of law, a presumption of innocence for all defendants. Not only in this trial, but in every trial, in every case. Defendants are deemed to be innocent until proven guilty. If they are proven guilty by your verdict, and until that time, the mantle of the presumption of innocence cloaks them and we must regard them in that vein.

Now, you are here to determine the guilt or innocence of these defendants. Now, there has been in the course of the trial evidence admitted, mostly from the witness chair, and in some few exhibits admitted. And, there is a word that I would like to say to you about testimony. It would be nice if a judge were able to tell a jury, look fellows, you've seen the witness. You had a

chance to look him in the eye, listen to him while he was talking, and, here are the rules to determine whether what he told you is truth or fiction. These are the guidelines to establish the validity of evidence or these are further guidelines to establish what weight you will give to this statement or to that statement.

Unfortunately there is no such thing. We have no rule of thumb. We have no guidelines to guide you as to your evaluation of the testimony. We lean on the rather flimsy trunk, and say to you, look, you've all lived a good many years, you've encountered many, many kinds of experiences, you've dealt with people in business, socially, in sports and many other ways. And, you've heard so many stories you have now developed a sense of knowing based upon your own life's experiences. What sounds credible to you, and what sounds incredible.

We ask you, it's perhaps not a very strong thing, but we ask you to lean on that experience, on the much experience that you have developed in the course of your lifetime to enable you to evaluate the stories that you have heard from the various parties on both sides here. And do the best you can.

Now, witnesses. We have had for the People, we have had several witnesses. We have had police officers

Viera, we have had the chemist here, Mr. Mullaly, also from the Police Department, we have had Patrolman McLain, Cordelia, Sergeant Stefania, and Assistant District Attorney Martin Hershey, all of whom represent the law enforcement agency.

Now, you were asked in the course of your being selected, you know, the fact that there is a policeman here, or law enforcement agent, does that fact mean that you're going to believe him, or disbelieve him, and you all answered that you would take it face value what he had to say, and I ask you now to apply your life's experiences in being able to evaluate testimony to what they've said.

They are officers, they have testified here to their actions in the course of their job, and you will determine for yourselves whether their statements are believable, and if they're believable, you will accept them and if they don't seem believable to you, you will not accept them.

Now, there is one great power a jury has, and we must tell you about this power, and it is this. That you have the power, in the event that you find that any witness has willfully misled you as to an important point in the testimony, you have the power to disregard not only that point that you find to be incredible, but

everything that that man has testified to. Or that woman has testified to.

Now, this is a very great power. You are not required to dismiss that which you find a person has lied to you about. Even as to the portions that you don't believe he's lied about. You can be selective. But you do have the power. You do have the power not only to reject what you find to be unworthy of belief, the one paragraph, the four sentences that might constitute that, but everything. If he's testified for two days. You have the power and the right to throw out everything that he said.

Juries generally exercise that power sparingly, and, I just tell you about it, and you will make your own determination, if there is something here that any of the witnesses has indicated that you just don't believe, you are not required, and I'm not telling you that you must disregard his total testimony. You may be discriminatory, and selective, and you may just reject that portion that you don't like, and accept everything else, or you may go the whole hog. That's up to you.

Now, these are sort of general rules to guide you. Now, the testimony basically here has been repeated so many times by the various policemen that I don't

think there is any need of my going into it again. ¹¹⁸³
Basically, we all recall from looking at People's Exhibit
Three there, that a couple of vehicles took up positions,
and when the Chevrolet bearing Florida license plates
came over the bridge, they -- they boxed the car in,
and followed the arrests of the three occupants of the
car, and the appropriation of a brown manila envelope
which was later taken to the Police laboratory, and
tested and we have heard Patrolman Mullaly indicate
that there was something like 33 ounces combined in the
two packages each of which I believe he testified
contained 16 and one half ounces or as he put it, one
pound, one half ounce. That comes to sixteen and a
half ounces.

Now, also in this case, the defendant Low took
the stand and the others did not. Which makes me want
to say something about that. I know I've said it
before, but again, for the purposes of the record in this
charge to you, I want to indicate to you that no defend-
ant is compelled to take, in a criminal case, is com-
pelled to take the stand.

When he pleads not guilty, at his arraignment
in Court here, each defendant by so pleading not guilty,
denies each and every allegation of the indictment,

and every material part of that count in the indictment. The defendant is entitled to stand mute at the trial, and you may not infer from his doing so that it evidences any guilt on his part. And this is so for the very good reason as I have explained to you before, that under our system of jurisprudence, we just presume innocence until the jury find him guilty, if the jury does find the person guilty. So there is this presumption of innocence of the defendant.

Now, in this case, as you know, two of the defendants did not take the stand. It was Carmen Garcia and Widelto Leyva, and Jose Low did take the stand. Now, I repeat, that as a matter of law, you may not draw any inferences as to the witnesses -- as to the defendants as to any inference of guilt, merely because they did -- they chose not to take the stand in their defense.

You can find them guilty only if you find that the prosecutor, that the People of the State of New York, have proven them guilty beyond a reasonable doubt.

And that brings us to the rather important question of the burden of proof in a criminal case. Now, because of this presumption of innocence, it follows logically that the proof of guilt of the defendants rests upon the prosecution.

The prosecution has the burden of proof. There's no question about it. This is so. District Attorney at all times during the trial has the burden of proof of the defendants' guilt. Under our law and procedural rules, the defendants are never obliged to prove their innocence. Again, by this plea of not guilty, they deny every charge levelled against them in the indictment, and they place in issue every material allegation in the complaint.

On every such allegation, on possession, on knowingly, on unlawfully, the District Attorney has the burden of proving the defendants' guilt and beyond a reasonable doubt. And, you have been told, and it has been heralded that I will tell you, talk to you about reasonable doubt. This, gentlemen, is a relative concept, and it's a difficult concept. I'm going to talk to you a little bit about it. Just sort of explain it, what we mean by this thing. What it is, what it is not, what you may do, and what you may not do.

Incidentally, for those of you who have never served on a criminal case before, but have served on a civil case, you do know the difference, you may recall in a civil case, there was the rule, the plaintiff to succeed had to convince you of the worthwhileness of his cause

by this standard, a fair preponderance of the evidence. Well, we are not in a civil case now. This is a criminal case. The rule here is that the People, comparable to the People in a civil case, the People here must prove their case beyond a reasonable doubt. So the phrase "reasonable doubt" becomes terribly important.

You heard all the squabbling yesterday in the summations when one of the lawyers kept forgetting to put the word "reasonable" in there. One of the other attorneys raised hell about it. He insisted that the word "reasonable" be in there, and for good reason.

Now, reasonable doubt, ladies and gentlemen, where did I get that? I must have written that down. Gentlemen. Is just what the words imply. The big thing to remember about it, and this may seem utterly simple, but it isn't. It's not.

A reasonable doubt is one that has to be based on reason. Reason. I'm going to go you one step further on that. That reason can't be something so private and so locked in your mind that you can't express it. What I'm saying to you is that a reasonable doubt has to be a doubt that is based upon your mind's operation, and it has to be that you can at least you don't have to be a brilliant orator, you don't have to be

terribly articulate, but you've got to be able to tell your colleagues, look, I have a doubt, and it's based upon this. I just don't see this. And I don't see it because this fellow said this, and this was not said.

There has to be some basis for it. It can't be pure whim. You know, we sometimes talk about it, well, I don't know syndrome. That's never going to get in the record with that intonation, but people sometimes have doubts because they have doubts about everything. They're indecisive, they just don't know, and they prefer to lean behind the I don't know bit.

Well, you're now a jury in a criminal case. You are now allowed the luxury of the exercise of that syndrome of just saying well, I don't know, and fellows, I just can't explain it, but I -- I just don't know. I have a doubt. That is not good enough.

A reasonable doubt has to be based upon some operation of your mind relating to reason that you can however fumblingly explain. Now, this is not asking each and every one of you to -- to give up any feeling of conscience that you may have about the facts that develop in the course of your deliberations.

Nobody has asked you even in the course of selecting

you to join the herd. If you conscientiously feel for good reason otherwise, just explain it, stick by your guns, that's your right, and, nobody is asking you to change that posture on your part.

Now, it's possible to establish the guilt of the defendant to a reasonable degree of certainty. To that degree of proof you must hold the People. Reasonable degree. And if they fail to sustain that burden, then the defendant is entitled to the benefit of a reasonable doubt and to your verdict of acquittal.

Now this rule of law does not mean to say that the prosecution must show that the defendants are guilty beyond all possible doubt, or to a mathematical certainty. Reasonable doubt is not speculative or imaginary doubt such as anybody may conjure up about anybody else under the sun. You just don't pick a reasonable doubt out of thin air. You pick a reasonable doubt out of your mind based upon good solid reason that you can in some way, however feeble, explain, so that one knows, your eleven colleagues know that it's not just a whim or it's not just a gimmick.

When I say gimmick, I mean a subterfuge, really, to which some jurors might like to resort in order to avoid the performance of what may seem to them to be a

disagreeable duty. There are many jurors, you know, who just shrink at the thought of passing any kind of a judgment about his fellow man.

Now, I don't know whether this is even applicable, or worthy of talking about, gentlemen. I think in the course of selecting you, you were probed for that kind of feeling, and I don't think any of you gave any question or gave any suspicion that you shirk as to a duty if you feel that it is your duty to convict.

And there are -- there is another breed of cat where exactly the opposite. Might be very difficult for this person to acquit, but he must under the circumstances if reason explains that that way. A reasonable doubt is an honest doubt based on the evidence in the case or the lack of it.

The proof that you've heard which has been unsatisfying, or the lack of proof where you feel that it's mandated to be there, and a reasonable doubt must, I come back to this again and again, lend itself to a reasonable explanation of factual data admitted in evidence, and ~~near~~ on mere surmise or speculation.

So, recap on the sort of difficult concept, at least it's difficult for me to expatiate on, because I'm never sure whether I'm reaching the people, but I think

it's boiling it down in essence the People are not held to anything beyond a measure of proof beyond a reasonable doubt. And you can't hold the People to more than that.

And, a reasonable doubt is something that you have to be able to articulate. In some way, based upon the law that I've given you, coupled with the facts, and coupled with your good common sense.

Now, the People's case is based upon the fact that I just indicated to you before that this vehicle was apprehended, searched, a packet of cocaine was found in it, and at the same time, as the finding of the cocaine there were three people in this vehicle. That is the People's case.

Now, they are entitled to the benefit of a presumption. You've heard that word used maybe fifty to sixty times in the last few days, and I'm going to read you what the law says about that presumption. Again it's the Penal Law, and it's Section 220.25. "The presence of dangerous drugs in an automobile other than a public omnibus like a taxicab or bus or something, is presumptive evidence of knowing possession thereof."

Knowing possession thereof. "Of each -- by each and every person in the automobile at the time such drug was found." I'll read it again. "The presence

of a dangerous drug in an automobile other than a public omnibus is presumptive evidence of knowing possession thereof by each and every person in the automobile at the time such drug was found."

Now, there are exceptions to that. The omnibus is one I've already mentioned, that that's inherently in what I already read, if it's in an omnibus you're not going to charge the bus driver with it or charge the cab driver with it necessarily if it's found in the back seat. There are other exceptions. If it's on anybody's person. If it's in a lady's handbag or if it's in your breast pocket or your back pocket or tucked under your beld, then it is not presumptive as to anybody else in that car if it's on your person, so forget it there.

And likewise it's not presumptive evidence against four people in the car if one of them has it and he's got a prescription for it. Then, of course, this presumption does not apply. None of those exceptions seem to be present in this case. So we get back now to the People's reliance upon this presumption very strongly as part of its case.

The People are relying on this presumption which says if there is a contraband, in this case, cocaine found in a vehicle and people are in it, this presumption

says that each and every person in that automobile according to the law, it's presumptive evidence against each and every one of those persons of their knowledgeable possession of the presence of the contraband in the vehicle.

This is not a conclusion. This isn't an ultimate fact. It's a presumption. It's presumptive evidence and you've heard this 20 times. It is rebuttable. If it's rebutted successfully, the presumption falls. The People no longer have the advantage of it. If it's not rebutted successfully, it stands, and the People get the benefit of it.

Now, the presence of a dangerous drug in an automobile is presumptive evidence of the possession of that drug by all, each and every person in the automobile at the time that the drug is found there.

To put it another way, upon proof of the presence of the cocaine in the vehicle, and further upon proof that these three defendants were in the car with the cocaine at the time of the arrest, the Penal Law says in effect that from this evidence, each of the defendants in the automobile possessed the cocaine, knowingly possessed the cocaine.

Be 71

This presumption has been created by statute

specifically to aid the People who have the burden of proving guilt beyond a reasonable doubt. Now, the presumption can be overcome by any one or all of the defendants who come forward with sufficient evidence to rebut the presumption.

The presumption can be overcome from all of the testimony in the case including the testimony from the People's witnesses on cross examination. If the defendants do not testify, and that has been our case with two of the defendants, which they are not required to do. You have heard that ad nauseum now.

While the presumption of illegal possession of a dangerous drug can be overcome, we still say to you, that the People always retain the burden of proof of the guilt of the defendants beyond a reasonable doubt. The presumption is created by the Penal Law to permit you as the jury, the trier of the facts in the case here, to presume an illegal possession of the cocaine upon proof of the presence of the cocaine in the automobile occupied by these defendants at the time of the arrest.

Now, if you find, if you find that the People have not proven beyond a reasonable doubt, that the cocaine was present in the car when the defendants were arrested

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in other words, I will repeat that if you find that the People have not proven beyond a reasonable doubt, they failed, that the cocaine was present in the vehicle when the defendants were apprehended, then the PEOPLE are not entitled to this presumption of the defendants' knowingly possessing the cocaine found under the seat. And the plaintiffs' case then would fail.

Because there is no other proof in my recollection of the defendants' knowledgeable possession of the cocaine other than this presumption. And your verdict would then have to be to acquit the defendants on both Criminal Possession in the First Degree, and the other charge, Criminal Possession in the Fourth Degree. And you would have to acquit on both if you find that there wasn't any cocaine in the car, and that the defendants weren't in it when the cocaine was found or whichever of the two.

If they fail, if you deem that the People have not proven that, and they're not entitled to the presumption, then there is no knowledge, which is necessary for a conviction here on both the first and the second counts in the indictment which relate to criminal possession in the first degree in the first count, and criminal possession in the fourth degree in the second count.

Because in both cases, knowledge and possession are essential elements of the case. However, if you find that the People have proven beyond a reasonable doubt, that there was cocaine and sixteen ounces of it in the car, and that the defendants were in the car with that cocaine at the time they were arrested, then the People are entitled to this presumptive evidence that each of the defendants knowingly possessed the full amount of the contraband.

In other words, what we are talking about now, is whether or not the People are entitled to the benefit of this presumption. And if they established it to your satisfaction the cocaine was in the car, the people were in the car at the time of the arrest, he's entitled to the presumption. He's entitled to the presumption which goes to their knowing of the presence of that stuff in the car, and therefore charging them with possession.

In that event, you're still not to the point of a verdict. In that event, you will search all of the remaining testimony to assess whether the defendants now, have produced sufficient evidence to overcome the legal presumption of knowledgeable possession.

Now I charge you that it need not be testimony from the defendants themselves, although we have heard

show that they are not guilty

from the defendant Low in his own behalf. This testimony can come from other witnesses called by the defense. In this case there were not, but it's a possibility, or, it can come from the testimony elicited on cross examination by the defendants of the People's own witnesses.

I further charge you that the defendants' testimony to overcome this presumption, this statutory presumption must be substantial. It must be such as to create a reasonable doubt in your minds that the defendants knowingly possessed this cocaine.

Now, gentlemen, if when you get through that little stage of step by step logical reasoning, if then in your judgment, the defendants or one of them or two of them or all of them have succeeded in overcome the presumption, if the defendants overcome the presumption in your mind, then I charge you as a matter of law you must find that defendant or defendants not guilty of both charges.

If in your judgment the defendants have not succeeded in overcoming the presumption, in other words, the People now get the benefit of the presumption, if that turns out to be your judgment, then you may find the defendants guilty of count one of the indictment, Criminal Possession of Dangerous Drugs in the First Degree on that, and on that alone.

You will be required to grapple with charge two in that event. Count two. Criminal Possession in the Fourth Degree. You are not quite ready yet for that kind of a judgment should you reach that stage as to the second charge. Criminal Possession in the Fourth Degree. Because, as you will recall, I indicated that there is one ingredient in the lesser crime charged here that differs from the first, and that is the intent, the intent to sell.

First Degree, the more serious charge, intent is not a factor at all. It's a question of knowledgeable possession, and unlawful possession of sixteen ounces of cocaine; whereas in the second count, the fourth degree charge, it's knowledgeable possession, unlawful knowledgeable possession of any quantity with the intent to sell.

Now the presumption does not go to intent. The presumption merely goes to possession, and knowledge, and that's all. Possession and knowledge. So, on the fourth degree charge, we have to grapple now, you have to grapple with the question of intent to sell.

I tell you that there has been no direct evidence of any kind by the People or in their behalf, in behalf of the People, to establish directly or dealing directly

with the subject of intent to sell. However, in criminal prosecutions, all of you are Perry Mason addicts, I think, or have been at one time or another in the course of your few years of living, and you've heard circumstantial evidence, and that is something that in criminal cases in the criminal branch of the law, there is greater reliance on than there is perhaps in the civil branch of the law, and I suppose for the general reason that crime in general is not done out in the open, it's sort of a clandestine thing shrouded with some secrecy to cover maneuvers, and very often, and this happens even in civil cases, the jury is always a little frustrated because there hasn't been some testimony directly in point on what the jury feels it has to know in order to come up with the right answers.

Now, this concept of circumstantial evidence has been developed, and it's particularly applicable in criminal cases or more frequently used there, let's say. And what it basically means is this. That, you can use your deductive reasoning processes to draw inferences. Things not testified to, conclusions, if you will, among other things from facts that are in evidence.

Now, this doesn't allow you to open sesame on a fishing expedition of wild proportions. You just

can't say well, I'm going to conclude this. There are strict rules as to the application of circumstantial evidence.

Basically, and they're simple. You are allowed to use your powers of reasoning to deduce facts not in evidence from facts in evidence. There are safeguards even as to that. They must point to the guilt rather than to the innocence of the -- of the party in order to sustain that. If you come out with something that points equally to guilt and innocence, obviously you must reject guilt and establish innocence.

Because, the People have the burden beyond a reasonable doubt to prove their side of this case. So, if it breaks out even, if you can draw from a given set of facts, from A, B, C, D, you can draw fact X, and also equally logically draw fact Y from those same facts, and one goes for guilt, and one goes for innocence, you must opt for the conclusion, or the inference that calls for innocence.

Now, the rules in a nutshell are this. The conclusion, or the inference that you draw must be from direct evidence heard or seen at the trial, the conclusion of guilt should flow naturally from the proven facts and be consistent with the proven facts.

The proven facts must be consistent with, and point to the guilt of the accused, and they must also be inconsistent with innocence and you are not justified in convicting on the basis of circumstantial evidence or even coming to a conclusion on the basis of circumstantial evidence if it leaves the -- a big cloud of mystery. It should be clear and you should be able to agree that this is the logical inference to flow from this given set of facts.

Now, on the intent to sell, there is no direct evidence on that at all, as to the second count in the indictment. If you find it at all, it must be on the basis of analysis of the facts in evidence. If you find that you can reasonable infer from all of the facts that there was an intent to sell on the part of the defendants, then you may so find, but if you find that there is nothing, then you must reject, and acquit as to the second count in this indictment.

Now, gentlemen, there isn't much I have to say more. Except for this. And this is very important. There are three defendants here. And you must treat each one of these defendants separately. As if each one of them was individually on trial here. This is not a class trial. These are three individuals.

They're all lumped in the same indictment, but you've got to treat them all separately. You must treat your process, you must indulge your process, logical process in going step by step as I've outlined it for you for each of these people. You must ask first has the statutory presumption, assuming that you find that the People have established cocaine in the car, and the people in the car at the time the cocaine was found, assuming that, has the statutory presumption of knowledge been overcome by Carmen Garcia, has the statutory presumption of knowledge and possession been overcome as to Mr. Low, and then has it been overcome as to Mr. Leyva? Then you must ask yourself have the People sustained the burden of proof of guilt beyond a reasonable doubt of Carmen Garcia, and don't think of the other two. When you finish with that decision, have the People sustained the burden of proof of guilt beyond a reasonable doubt as to Mr. Low. When you finish with that, have they done -- have the People sustained the burden of proof of guilt beyond a reasonable doubt as to Widelto Leyva?

Now, have that People sustained their burden of proof beyond a reasonable doubt on the First Degree charge? Criminal Possession of a Dangerous Drug in the First

Degree? The class A felony. As against Carmen Garcia and then as against Low, and then as against Leyva. Don't treat them collectively. Individually.

And likewise, as to the second count of the indictment, the Criminal Possession of a Dangerous Drug in the Fourth Degree. Have the People sustained their burden of proof beyond a reasonable doubt as to that second crime charged as to Carmen Garcia, and then as to Low and then as to Leyva? Have I made my point?

We must do it individually. Now, the form of the verdict will be, gentlemen, I find the defendant Carmen Garcia guilty, not guilty of the first count in the Indictment, Criminal Possession of a Dangerous Drug in the First Degree, I find the defendant Carmen Garcia guilty or not guilty of the second count of the Indictment, Criminal Possession of a Dangerous Drug in the Fourth Degree. I find the defendant Jose Low either guilty or not guilty of the first count, I find the defendant Jose Low guilty or not guilty of the second count. I find the defendant Widelto Leyva guilty or not guilty of the first count, guilty or not guilty of the second count.

We have to get an individual verdict for each of the three defendants. We have to get an individual verdict

for each of the two crimes charged. So there will be two verdicts on each defendant.

Now, I'm sure you know, but for purposes of the record, let me tell you that we require unanimity. All twelve of you must agree. As to guilt or lack of guilt in each case.

Now, gentlemen, just a word of what, advice? There is so much that I could say about how you would approach this thing. I have tried to give you what seemed to me to be the most logical and the simplest step by step process in arriving at this thing. Arriving at your verdict. But I am not talking about that, really. I am talking about your conduct toward each other.

Now, you are twelve men. You have been selected because you promise d to do your best to come up with a fair and honest and objective verdict without sympathy without prejudice of any kinds whatsoever. Based solely upon the facts and the law, and that's what I'm asking you to do.

Now, you will discuss probably many points, and point by point in this process. And gentlemen, I can talk for probably 14 or 15 paragraphs on the subject, but it boils down to one thing. Respect one another.

Now, if you've observed my earlier admonition,

and you haven't told somebody you figured out the case six days ago, or was it six weeks ago? This case has been going on for a long time. If you haven't gotten yourself in dutch by a bad guess at some earlier stage in the trial, you should go in there as equals.

I don't care about your educational attainments, or how much money you make or anything. You are all equal and each one should respect the opinion, the judgment, the comments of the other eleven. And, just bear that in mind. That's important. We don't expect everybody sitting on the jury, and believe me, this is not meant to be a slight to a soul there. It's just a case of human frailty, and I'm probably more guilty of it than most. You've heard me say I've tuned out a few times when I read the question back. I didn't hear you. I don't expect really that all twelve of you will have caught every single thing I've said or understood every single thing I've said.

You are entitled to come back here when you're in doubt to find out what it is I did say, or to get an elaboration on any points that are obscure to you. But I suggest before you do that, that you discuss it among yourselves, because what you, sir, may have missed, your neighbor may have picked up, and then he'll be

scratching his head over another point that's very clear to you. So, that's what you're here for to hammer it out.

When you reach a critical point and you just are -- in a fog, about it, and you need some help, we're here, and this is our job, to help you and elaborate, either repeat, or go beyond what we have already said in clarification of the charge.

Likewise as to the evidence that you've heard here. Now, if you reach a point and it's critical evidence, not just he said his name was Joe, no, it was Sam, and you want to come down here to find out whether his name was Joe or Sam when it's got not a darn thing to do with the verdict, that's a waste of time. We ask you not to do that. But if you reach a point of impasse, you can't agree as to what the testimony was, and the testimony is crucial to your verdict, don't hesitate, don't guess, and don't indulge in conjecture, you come down here, and we'll have it read back to you. Every word that I'm saying, that has been said here is on record here.

So, gentlemen, that's it. We will not send up any exhibits to you. You will have to ask for them. Straighten out what you miss among yourselves where you

can. If not, come down here and we will be very happy to -- to do what we can to answer your questions.

Now, before you commence your deliberations, will you kindly take a recess? The attorneys have an opportunity at this point to take exceptions to my charge and to ask me to charge further. So let me hear them outside of your presence. Have a good smoke and don't decide the case yet until you start to deliberate.

(At this point, the jurors stepped out and there was colloquy among the Court and counsel.)

(The jury was brought back into the Court.)

THE COURT: Gentlemen, the charge that I have given you will be and substantially as I have given it to you. Except my attention was called to one point which I agreed you should hear more about. And, that has to do with the -- with the weight of the packages that are in evidence here. The cocaine.

And I'd just like to read you this paragraph or two. The requirement as to sixteen ounces, now we're talking about obviously the first count in the indictment, the requirement as to sixteen ounces does not mean sixteen ounces of pure cocaine. Extracted from and isolated from a larger heavier mixture.

The reference in the law to sixteen ounces, that's the level above which you get this Class A, First Degree bit, is to the weight of the mixture containing the narcotic cocaine. You may recall some questioning of the Police chemist on this point as to whether he made a quantitative analysis of the substance to measure the weight of the cocaine relative to the total weight of the contents of the packages.

And no such measurement was made, and the officers testified that the law does not distinguish between a rich mixture or a lean mixture in these matters. If

the mixture contains cocaine in any proportion, and weighs sixteen or more ounces, then, a knowing unlawful possessor of sixteen ounces or more is subject to prosecution as, a possession charge in the First Degree.

Now, I had ment to read that to you before, and I inadvertently skipped past it. There has been -- there have been requests by all three defendants, to charge you further on the question of the burden of proof and I think I should say this. Because, of the unanimity they thought perhaps I may ~~have~~ conveyed the wrong impression to you. I will say this, and no more on the subject.

The burden of proof rests with the People. And that burden is that they must establish the guilt of each of the defendants beyond a reasonable doubt. It does not ~~shift~~ to the defendants. That burden always stays with the People.

The defendant has to overcome the presumption that the law gives the People, provided you find that there is a foundation for implementing that presumption. And that would mean that you would have to find that there was cocaine present in the car and that these people were present in the car at the same time of the arrest. That gives rise to the presumption.

The presumption deals with knowledgeable possession. So that means that if you invoke the presumption, if you say the foundation has been laid, and that the evidence is satisfactory to you that there was cocaine in the vehicle, that these people were in at the time they were apprehended, the presumption is set up.

The presumption goes the step further of charging the defendants with knowledgeable possession of the contraband found in the car. Then, the -- there isn't a shifting of the burden of proof at all. But, this is a presumption set up by law that the defendants must rebut or else it stands.

Now, they have to come forward as I have indicated either by one of the defendants taking the stand or, having other witnesses, which didn't happen in this case, I gave you the three possibilities. Or the third one of -- it is their evidence when they cross examine the People's witnesses.

So you can use that. You can use Mr. Low's statements and evaluate all of the testimony adduced in that way in behalf of the defendants in determining whether or not this presumption is rebutted.

But keep your eye on the ball. The burden of proof always rests upon the People to establish the guilt

of the defendants beyond a reasonable doubt.

Gentlemen, would you start deliberating at least for fifteen minutes, and then go to lunch, and then resume your deliberations this afternoon.

Sir, we want to thank you, congratulate you on the fact that your services were not needed, but we want to thank you for your services, and if you will just make yourself available, separately until after lunch at least. Thank you, gentlemen.

* * *

behalf of Jose low.

THE COURT: Mr. Ellison.

MR. ELLISON: Yes, sir. I take exception to your Honor polling each juror separately. And I further take exception to your Honor's reiteration of the charge with reference to the second count on the grounds I previously mentioned when your Honor gave the main charge to the jury.

MR. SONENSHINE: I will join in the exceptions taken by Mr. Ellison.

MR. MARKOWITZ: So will defendant Low.

THE COURT: Very well.

(The dinner recess was taken.)

(The jury returned to the courtroom.)

THE CLERK: For the record all defendants present. All attorneys present.

(Roll of jurors was called.)

THE CLERK: Mr. Foreman, have you reached a verdict?

THE FOREMAN: Yes, we have.

THE CLERK: Please rise.

How does the jury say as to

defendant Carmen Garcia under the first count of the indictment charging criminal possession of a dangerous drug in the first degree? What do you find as to that indictment?

THE FOREMAN: We, the jury, find under the first indictment defendant Garcia, Leyva and Low.

THE CLERK: One at a time. Just Garcia.

THE FOREMAN: Garcia. Guilty.

THE COURT: Hold on just a minute, please. This is the first count of the indictment. Carmen Garcia you find guilty?

THE FOREMAN: Guilty, sir.

THE CLERK: How do you find as to the defendant Low, under the first count of the indictment charging criminal possession of dangerous drugs in the first degree?

THE FOREMAN: Guilty.

THE CLERK: How do you find as to the defendant Leyva, under the first count of the indictment charging criminal possession of a dangerous drug in the first degree.

THE FOREMAN: Guilty.

THE CLERK: How do you find as to the defendant Garcia under the second count of the indictment charging criminal possession of dangerous drugs in the fourth degree?

THE FOREMAN: Guilty.

THE CLERK: How do you find as to the defendant Low in the second count of the indictment charging criminal possession of dangerous drugs in the fourth degree?

THE FOREMAN: Not guilty.

THE CLERK: How do you find as to the defendant Leyva under the second count of the indictment charging criminal possession of dangerous drugs in the fourth degree?

THE FOREMAN: Guilty.

THE CLERK: All right, Mr. Foreman, sit down, please.

listen to your verdict as it is recorded.

You say you find the defendant Garcia guilty under both counts of the indictment as charged. You find the defendant Low guilty to the first count of the indictment charging criminal

possession of drugs in the first degree and not guilty as to the second count. You find the defendant Leyva guilty under both counts as charged, is that your verdict, so say you all?

MR. SONENSHINE: May we have the jury polled, if the Court please?

THE COURT: Yes indeed. Poll the jury as to the first count in the indictment as to the defendant Garcia first, then Low, then Leyva. It may take a little time but I prefer it that way.

THE CLERK: Gentlemen, you say you find the defendant Garcia guilty under the first count of the indictment charging criminal possession of dangerous drugs in the first degree? Mr. Puccio, is that your verdict?

MR. PUCCIO: Yes, sir.

THE CLERK: Mr. Larsen, is that your verdict?

MR. LARSEN: Yes, sir.

THE CLERK: Mr. Plattner, is that your verdict?

MR. PLATTNER: Yes, sir.

THE CLERK: Mr. Tortouci, is that your verdict?

MR. TORTOUCI: Yes, sir.

STATE OF NEW YORK)
 : SS.:
COUNTY OF NEW YORK)

VIRGINIA VASQUEZ , being duly sworn, deposes and says thats he isemployed in the office of the Attorney General of the State of New York, attorney for Respondent-Appellee herein. On the 2nd day of December , 1977, she served the annexed upon the following named person :

LOUIS R. ROSENTHAL
16 Court Street
Brooklyn, New York 11241

Attorney in the within entitled proceeding by depositing a true and correct copy thereof, properly enclosed in a post-paid wrapper, in a post-office box regularly maintained by the Government of the United States at Two World Trade Center, New York, New York 10047, directed to said Attorney at the address within the State designated by him for that purpose.

Sworn to before me this
day of , 1977
2nd December

2nd December
Thos. C. Hughes
 Assistant Attorney General
 of the State of New York

Virginia Cargus

